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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

SHANE McDAID et al., Plaintiffs and Appellants, v. HELLER PACIFIC, INC., Defendant and Respondent.	C083174 (Super. Ct. No. 34201400163317CUPOGDS)

Plaintiffs Shane and Janette McDaid brought an action for personal injuries against defendant Heller Pacific, Inc. (Heller), manager of the Midtown Art Retail Restaurant Scene (MARRS) building in downtown Sacramento. In a special verdict in July 2016, a jury found Heller was not negligent.[1] The trial court entered judgment in Heller's favor.

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[1] The jury returned the same verdict for the defendant owner of the property, which is not a party on appeal. Although Janette McDaid had filed a notice of appeal, we follow the style of the briefing that refers solely to Shane McDaid as the plaintiff and appellant.

McDaid completed his briefing on appeal in August 2018. He argues that the trial court erred in excluding evidence of remedial measures subsequent to his accident. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Given the nature of the appellate challenge, few of the underlying facts regarding the accident are relevant. We briefly sketch them out for context.

In front of the various MARRS businesses, there is a raised wooden deck running along 20th Street. It abuts a preexisting concrete slab, with a smooth four-inch metal strip that runs down the middle of the walkway covering the interface between the two. On an April evening in 2014, McDaid had been attending a comedy show at one of the MARRS businesses with his wife and a friend. At the end of the show he conversed with the manager and performers for a while, after which he was walking with the friend at about 10:30 p.m. to join his wife at a restaurant that was a few doors down. It had rained that day and drizzled earlier in the evening. McDaid's legs slipped out from underneath him, purportedly when he stepped on the metal strip, and he landed on his back.[2] Because he had a preexisting medical condition, he incurred a severe fracture in his femur.[3]

Turning to the crux of the appeal, McDaid filed several pretrial motions in limine in which he sought the introduction of evidence that Heller applied grip tape to the metal

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[2] As McDaid himself acknowledges in his opening brief, "[a]nother causation issue was whether [he] slipped on the metal strip or on the wood[en decking]." The jury never reached the issue of causation.

[3] As it is not germane to the motion in limine, we omit evidence to which the parties allude regarding notice of prior accidents, or possible contributory negligence on the part of McDaid (another issue the jury never reached), or the details of McDaid's preexisting medical condition (as proximate cause was not at issue, defense counsel noted in closing argument that the resulting broken leg was not in dispute).

strip *after* the accident. McDaid contended this evidence was admissible regardless of the longstanding general rule prohibiting such evidence as a matter of public policy. (Evid. Code, § 1151; *McIntyre v. The Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664, 671 (*McIntyre*).) He based this assertion on the use of this evidence to impeach expected testimony that the metal strip was safe when wet, and he also contended that photographs of the metal strip with the grip tape in place showed how water pooled on the metal strip (impeaching defense expert testimony to the contrary) and the absence of caution signs after rain (impeaching defense testimony to the contrary). He also contended this evidence was admissible on the issue of infeasibility of remedial measures.

In support, McDaid attached excerpts from the deposition of Heller's property manager, in which she attested to a building practice (that she did not oversee personally) of placing caution signs after there was rain, which should have taken place on the date of the incident if there had been rain. She also had stated that she and Heller's owner had discussed the possibility of applying a gritty overlay to the metal strip and the deck but were concerned about whether it would wear off and make matters worse. In a response to a request for admissions, she acknowledged that warning signs were not present on the date of the incident, but denied that the property was in a dangerous condition. McDaid also attached deposition excerpts from a defense expert who asserted that the metal strip was not unsafe. Although he had never examined the deck after a rain, the defense expert said that decking ordinarily is designed to prevent any pooling of water. Another defense expert claimed that Heller was diligent about caution signs after rain, that the metal strip was not a hazard before the application of the grip tape, and that grip tape itself can present a hazard if the ends fray.

Before trial, the court simply indicated that it was "going to defer [the motions]." The parties do not indicate any other consideration of the motions in limine on the record,

until a discussion before convening the jury at the start of the second day of trial, where the court noted it had sent an e-mail (not part of the record, as far as we can tell) to the parties over the weekend. The court "put the final ruling on the record." It did not find this evidence to be impeachment evidence. It also concluded that McDaid could demonstrate the feasibility of grip tape as a remedial measure by asking defense witnesses about this *possibility* without the introduction of evidence of the actual installation of the grip tape; "all of that is fair game."[4] With respect to the photographs, they were irrelevant because they were taken more than 18 months after the accident (for which reason they are not an issue on appeal). The court also concluded the prejudicial effect of the evidence exceeded its probative value.

The trial court did not indicate its ruling was conditional and subject to renewal during trial. The parties do not indicate that McDaid ever revisited the ruling. Indeed, when the trial court sustained an objection to questioning a defense witness about *implementing* remedial measures and (subsequently) struck the answer, the court flatly stated, "I ruled that that was not admissible," and explained to the witness "that's not something that should be discussed as part of the evidence in the case."[5] The record does not indicate that McDaid disputed the trial court's position.

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[4] It does not appear from the briefing that McDaid ever took this route, perhaps because it also does not appear from the briefing that Heller ever put feasibility in issue. (E.g., *McIntyre*, *supra*, 228 Cal.App.4th at p. 673.) Indeed, McDaid's attorney noted in closing that "they [did not] produce [any] evidence that this was difficult to do. It wasn't."

[5] For this reason, it is unclear why both parties point to *testimony at trial* in connection with the trial court's ruling in limine on the issue of impeachment. An appellate court's review is limited to the showing produced *at the time of a trial court's evidentiary ruling*, and not the record as it may have developed later. (*People v. Welch* (1999) 20 Cal.4th 701, 739; *People v. Berryman* (1993) 6 Cal.4th 1048, 1070.) For this reason, we do not include any of the trial testimony on this topic.

In point of fact, Heller's property manager had acknowledged at trial that the application of a grittier surface for the deck in general was something that had been under consideration in terms of its efficacy. In response to a question about whether they had considered focusing on just the metal strip, she responded, "Ultimately, yes, we did," which defense counsel later argued was toward the end of improving the deck.[6] In addition, a defense expert adverted to presently existing grip tape, admitting that it did not present a tripping hazard (but might if not properly maintained). The expert's testimony about grip tape "[a]s it's installed now" was stricken by the court, with a comment that McDaid's attorney was "just asking a hypothetical question about . . . grip tape in general." In closing argument, McDaid's attorney pointed out that it was not in dispute that the smooth metal strip was slippery when wet, and that Heller had chosen initially to put out signs rather than the grittier surface it had taken under consideration. Counsel (somewhat adumbratively) also noted that a presently existing grittier surface had not "created any type of problem" and thus the concerns about its use were "quite frankly overblown."

DISCUSSION

"It is not sufficient for the [proponent] to announce that [the offer of] evidence of subsequent remedial measures . . . [is] for a purpose other than to prove negligence . . . . The evidence must *reasonably* tend to prove a *relevant fact*, other than prior negligence . . . . If no other relevancy can reasonably be found, such evidence must be held to be inadmissible." (2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 2d ed. 1982) Evidence of Subsequent Repairs or Other Subsequent Remedial Conduct, § 34.2, p. 1284, third italics added.) The late Justice Jefferson distinguished between two situations

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[6] Heller's owner also testified that his aim was to make this the *safest* deck possible, which is not the same as conceding that it was not in a safe condition.

reflected in case law. If a witness testifies that steps *are not slippery*, the subsequent installation of grip tape is irrelevant if the witness did not authorize the installation but *is* admissible impeachment with respect *to the testimony that the steps were not slippery* if the witness was involved in the installation of the tape. (*Id*. at pp. 1284-1285.)[7]

The position of Heller as reflected in the deposition excerpts (and admission) produced in support of McDaid's motion in limine is best summed up in a line from the closing argument of defense counsel: "Slippery when wet does not equal a dangerous or unsafe condition." Thus, Heller *never* took the position that the metal strip was not *slippery*. The later remedial measure as a result did not *impeach* any *fact*, only Heller's *opinion* that the slipperiness was not a dangerous condition of itself. A crude popular simile notes that everybody has an opinion, so evidence contradicting the sincerity of a particular legal conclusion does not contribute in any measurable sense to the *factfinding* function; the jury was not bound to agree with Heller about whether a metal strip that is slippery when wet is or is not a dangerous condition. Therefore, the trial court cannot be said to have abused its discretion in concluding that this evidence did not rise to the level of sufficient probative value outweighing the inherent prejudice that the Legislature has determined arises from such evidence. (*Sanchez v. Bagues & Sons Mortuaries* (1969)

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[7] McDaid purports to extract a more lenient standard for impeaching *experts* with later remedial measures from *Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 Cal.2d 655, 660, 664-665, where the expert testified that the railway crossing was " 'the safest type,' " but the defendant had acceded to a request from a regulatory agency to install a different type, and the court held this was admissible to show that the expert had changed his opinion (although we confess we do not discern how the response to a regulatory request demonstrates the *expert's* change in opinion). However, as later explained in *Pierce v. J. C. Penney Co.* (1959) 167 Cal.App.2d 3, the general rule (as described in Jefferson's treatise) applied in the cases on which *Daggett* had relied (the subsequent remedial conduct of the *witness* belying the testimony of the witness), and the impeachment in *Daggett* was permissible because of the "extravagant" breadth of the expert's claim of utmost safety (*Pierce*, at pp. 10, 12-13), neither circumstance being present here.

271 Cal.App.2d 188, 191 ["the admission of such evidence should be limited to cases where the *need* for its admission outweighs [prejudice]"], italics added.) Nothing in the present case established this manifest need for introduction of the later safety measures in the course of the motion in limine (or indeed at trial). The trial court did not prevent McDaid from adducing evidence (as he did) that the wet smooth metal strip was slippery (not a proposition of which we would imagine the reasonable juror would otherwise be unaware), or that Heller in fact had taken the application of a grittier surface into consideration but chose a different course. We therefore cannot say that the trial court's decision to exclude the evidence of later remedial efforts was unreasonable or in contravention of legal standards. As a result, we reject McDaid's argument.[8]

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

s/BUTZ, Acting P. J.

We concur:

s/MAURO, J.

s/DUARTE, J.

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[8] Although we do not need to reach the question of prejudice, we note that it does appear McDaid was able, at least marginally, to adduce evidence of later remedial efforts and use this evidence in closing argument, which would indicate that a different outcome would not be likely if the trial court had ruled the other way.